United Rentals, Inc. *and* International Union of Operating Engineers, Local 12, AFL–CIO. Cases 21–CA–36814 and 21–CA–36930

April 27, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On January 13, 2006, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the Respondent filed a reply brief. The General Counsel filed a limited exception and supporting brief, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified herein and to adopt the recommended Order as modified.[3]

Since at least 2001, the Respondent's annual practice has been to evaluate employee performance and, effective April 1 of each year, to grant merit-based wage increases. On March 4, 2005, the International Union of Operating Engineers, Local 12, AFL–CIO (Union), was certified as the bargaining representative of a unit of the Respondent's employees at its facility in Pico Rivera, California. In 2005, without providing the Union notice and an opportunity to bargain, the Respondent failed to give evaluations and wage increases to Pico Rivera's newly-represented unit employees, though it continued its established practice for the nonunit employees at Pico Rivera and employees at its other facilities. The judge found that the Respondent's failure in this regard violated Section 8(a)(5) of the Act. For the reasons stated by the judge, as supplemented below, we affirm the judge's finding.

The Respondent's performance appraisal and wage-increase system is fully explained in the judge's decision, but we highlight the most pertinent features. First, the Respondent's performance review process involves fixed criteria and established procedures. Employees are evaluated against a set of job responsibilities and key behaviors set forth on an evaluation form; the review results in one of four ratings, ranging from "very good" to "unacceptable." The Respondent has "forced distribution" guidelines, which managers and supervisors are strongly encouraged to follow, concerning the percentage of employees to be placed in each of the four ratings categories.[4] Second, in making its annual April 1 wage-increase decisions, the Respondent regularly uses the same tool—a "merit matrix"—to calculate a recommended wage increase based on certain criteria: the Respondent's budgeted amount for wage increases,[5] the

[1] The Respondent also filed a postbrief letter pursuant to *Reliant Energy,* 339 NLRB 66 (2003), and the General Counsel filed a letter in response. We will address the contentions advanced in the Respondent's letter below.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

For the reasons stated by the judge, we affirm the judge's finding that the Respondent violated Sec. 8(a)(5) of the Act by unilaterally discontinuing its long-settled practice of allowing employees to take unpaid days off without using sick leave or vacation time. We find it unnecessary to pass on the judge's further finding that this unlawful change also violated Sec. 8(a)(3) because this additional finding would not materially affect the remedy. See *Strand Theatre of Shreveport Corp*., 346 NLRB No. 51, slip op. at 1 fn. 2 (2006).

With regard to the judge's finding that the Respondent violated Sec. 8(a)(1) by implementing a dress code that prohibited employees from displaying a union logo, Member Schaumber notes that the Respondent failed to establish any special circumstance that might have justified its dress code. Although an employee generally has a protected right under Sec. 7 to wear union insignia at work, that Sec. 7 right is not absolute, but "may give way when 'special circumstances' . . . legitimize the regulation" of such insignia. *Komatsu America Corp.*, 342 NLRB 649, 650 (2004). Special circumstances may include, inter alia, situations in which the insignia are vulgar or obscene (see *Southwestern Bell Telephone Co.*, 200 NLRB 667, 670 (1972)), or situations in which the insignia alienate customers (see *Systems West LLC*, 342 NLRB 851, 856 (2004)), or situations in which restriction of the insignia "is necessary to maintain decorum and discipline among employees." See *Komatsu*, supra at 650. The Respondent has not shown that any such circumstances justified its overly-broad dress code.

[3] We shall modify the judge's recommended Order to conform to the violations found. We shall also substitute a new notice in conformity with the Order as modified.

The General Counsel requests that the Respondent be required to read the Board's notice aloud to assembled employees. We agree with the judge's denial of this special remedy. The Board orders notice reading "where the violations are so numerous and serious that the reading aloud of a notice is considered necessary to enable employees to exercise their Section 7 rights in an atmosphere free of coercion, or where the violations in a case are egregious." *Postal Service*, 339 NLRB 1162, 1163 (2003). The Respondent's violations in this case, although serious, are not so numerous or egregious to warrant notice reading.

[4] Under the ratings guidelines, the Respondent recommends that 15 percent of employees be rated "very good," 55 percent "good," 20 percent "needs improvement," and 10 percent "unacceptable."

[5] Joyce Leone, the Respondent's compensation manager, testified that the Respondent determines its percentage of budget for wage increases by taking into account market surveys, the Respondent's overall

employee's position, grade, and corresponding salary band, and the employee's performance rating. Using "MeritNet," described as a "Web-based total compensation planning tool," the Respondent inputs the data from its evaluation process into a "merit matrix" to arrive at a recommended increase for each employee.[6] The Respondent's branch managers have the discretion to adjust this recommended increase within their branch's allocated pool of wage-increase funds; district managers also have the discretion to reallocate wage-increase funds between branches.

Under Sections 8(a)(5) and 8(d) of the Act, an employer that is party to a collective-bargaining relationship is obligated to bargain in good faith over "wages, hours, and other terms and conditions of employment." As a consequence of this obligation, such an employer violates Section 8(a)(5) if it unilaterally changes a term or condition of employment without first providing the union with notice or an opportunity to bargain.[7] Thus, where a past practice of adjusting wages constitutes a term or condition of employment, the unilateral discontinuance of that practice violates Section 8(a)(5).[8] A merit wage-increase program constitutes a term or condition of employment "when it is an 'established practice . . . regularly expected by the employees.'"[9] Factors relevant to this determination include "the number of years that the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof."[10]

There is no dispute that in 2005, the Respondent withheld evaluations and wage increases from its represented employees at Pico Rivera. It is also undisputed that the Respondent did not inform the Union that 2005 evaluations and increases had not been given until the parties' first bargaining session on May 5, 2005. Thus, the Respondent unilaterally withheld 2005 evaluations and increases without giving the Union notice and an opportunity to bargain over the change.[11] Accordingly, the determinative issue is whether the Respondent's system of adjusting wages was an established practice regularly expected by employees, and hence a term or condition of employment.

The Respondent has used MeritNet as part of its wage-increase program at Pico Rivera since 2002, and raises pursuant to that program were regularly granted effective April 1 of each year. In addition, the Respondent "used fixed criteria to determine whether an employee will receive a raise, and the amount thereof."[12] As summarized above and more fully explained in the judge's decision, the Respondent's system of adjusting wages takes into consideration a number of fixed criteria, including the state of the overall economy, area wage surveys, and the Respondent's financial status to determine the percentage of budget going to wage increases, as well as the employee's position, grade, salary band, and performance rating (itself arrived at through a structured process based on objective criteria) to determine recommended merit increases. Moreover, the Respondent also regularly uses the same tool, the MeritNet "merit matrix," throughout its wage increase planning. Thus, all three factors relevant to determining whether the Respondent's wage-

budget, and the general economy. This percentage is then taken into consideration when the Respondent makes its wage-increase decisions.

[6] In her testimony, Leone portrayed a highly structured system keyed to fixed criteria: "The merit matrix . . . takes into account . . . performance ratings, and also takes into account the employee's rate of pay and the position of that rate of pay with respect to the employee's salary range . . . . the matrix is structured kind of like a tic-tac-toe graph where you have ratings and then the salary range gets broken up into four tiles, so it's one greater than tic-tac-toe. And so whatever box that employee's rating and position and range falls into, that would be the proposed guidance to offer as a merit increase." The Respondent's 2005 Annual Salary Administration Guidelines describe MeritNet's methodology as follows: "Merit increases are determined by a matrix that takes into account a region's budget, employees' performance ratings and positions in the salary ranges. Based on this information, the system will pre-populate a proposed merit amount. The sum total for a group of employees will appear in the Plan Summary tab as a Merit Budget pool amount. This is the amount available to distribute to employees."

[7] *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

[8] E.g., *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

[9] *Rural/Metro Medical Services*, 327 NLRB 49, 51 (1998) (quoting *Daily News of Los Angeles*, supra at 1236).

[10] Id.

[11] For this reason, the Respondent's dependence on *Neighborhood House Assn.,* 347 NLRB No. 52 (2006), which it cites in its *Reliant Energy* letter, is misplaced. Relying on *TXU Electric Co.*, 343 NLRB 1404 (2004), the Board in *Neighborhood House* first reiterated the general rule that where parties are engaged in negotiations for a collective-bargaining agreement, the employer must maintain the status quo of all mandatory bargaining subjects absent overall impasse. The Board then explained that under a specific exception to the general rule, if a term or condition of employment concerns a discrete recurring event, and that event is scheduled to occur during negotiations for an initial contract, the employer may lawfully implement a change in that term or condition *if it provides the union with reasonable advance notice and an opportunity to bargain* about the intended change. *Neighborhood House Assn.*, supra, slip op. at 2. Here, however, as the judge explained in correctly rejecting the Respondent's reliance on *TXU Electric*, the Respondent informed the Union of the change after the fact. Thus, *Neighborhood House* and *TXU Electric* are unavailing.

Member Liebman agrees that *Neighborhood House* and *TXU Electric* are distinguishable. She adheres to the dissenting view expressed by Member Walsh in those cases with respect to an employer's duty to maintain the status quo.

[12] *Rural/Metro Medical Services*, supra, 327 NLRB at 51.

increase program was an established practice regularly expected by its employees have been met here.

In finding that the Respondent violated Section 8(a)(5) by failing to give 2005 evaluations and wage increases to unit employees at Pico Rivera, the judge relied principally on the Board's decision in *Daily News of Los Angeles*, supra. Excepting, the Respondent seeks to distinguish Daily News as involving a "mechanistic" system for determining wage increases, and to characterize its own system as almost wholly discretionary. Contrary to the Respondent's argument, its wage-increase decisions involve far less discretion than those in *Daily News*. In *Daily News*, the employer annually evaluated the performance of each employee and granted merit-based wage increases that were entirely discretionary in amount.[13] Notwithstanding that significant discretionary component, the Board found, and the D.C. Circuit agreed, that the employer's wage increases were not completely discretionary because they were based on the fixed criterion of merit.[14] Here, the Respondent bases employees' wage increases on a calculus from its "merit matrix," factoring in employees' performance ratings and salary range positions. Thus, the conclusion that the wage-increase program at issue here constituted a term or condition of employment is even more compelling than the like conclusion concerning the wage-increase program at issue in Daily News.

In support of its argument that its wage-increase program was not an established practice, the Respondent relies on *Acme Die Casting v. NLRB*.[15] That reliance is misplaced, as Acme is plainly distinguishable. There, the record showed a past practice of across-the-board wage increases varying in amount and granted, in the court's view, at somewhat irregular intervals. The court found that the timing of the increases "was by no means fixed," and more importantly, that there was no evidence that the employer "had 'constrained' itself by 'established procedures' or 'fixed criteria' for establishing the amount of the increases."[16] Here, by contrast, increases had been regularly effective the same time each year (April 1) for the previous 4 years, and the amount of the increases was based on established procedures and fixed criteria.

In sum, the Respondent's practice of conducting merit reviews and adjusting wages based on those reviews and other fixed criteria was an established practice regularly expected by its employees, and consequently a term or condition of employment. By discontinuing reviews and increases in 2005 for unit employees at its Pico Rivera facility, the Respondent violated Section 8(a)(5).[17]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Rentals, Inc., Pico Rivera, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(g) and reletter the subsequent paragraph accordingly.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. April 27, 2007

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Peter N. Kirsanow Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[13] *Daily News of Los Angeles*, 315 NLRB at 1236.

[14] Id.; *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 411–412 (D.C. Cir. 1996).

[15] *Acme Die Casting v. NLRB*, 93 F.3d 854 (D.C. Cir. 1996). In answer to the Respondent's citation to *Acme Die Casting*, supra, the judge did not distinguish that case but remarked only that he was "bound to follow Board law." As the Respondent renews its reliance on *Acme Die Casting* in its exceptions brief, we distinguish that case above.

We additionally observe that although the court of appeals in *Acme Die Casting* denied enforcement of the Board's 8(a)(5) remedy, it did not expressly reject the Board's finding that the employer's pattern of wage increases was sufficiently regular to constitute an established practice. Rather, it denied enforcement because the Board, on remand, had failed to adequately explain its finding, and the court found it remedially unnecessary to remand the case a second time. *Acme Die Casting,* supra at 859.

[16] Id. at 858.

[17] Member Liebman and Member Kirsanow adopt the judge's finding that the Respondent's failure to give unit employees evaluations and wage increases in 2005 additionally violated Sec. 8(a)(3).

In finding that the General Counsel met his burden of showing that union animus was a motivating factor in the denial of the wage increases, Member Kirsanow relies on the Respondent's unlawful conduct in prohibiting employees from displaying union insignia and in retaliating against employees' union activity by changing its policies concerning dress code, the use of service trucks, and leave. He finds it unnecessary additionally to rely on the fact that the withholding of the evaluations and wage increases and the change in leave policy also violated Sec. 8(a)(5).

Having found that the Respondent's 2005 withholding of wage increases violated Sec. 8(a)(5), Member Schaumber finds it unnecessary to pass on whether that same conduct also violated Sec. 8(a)(3) because such an additional finding would not materially affect the remedy. See *Strand Theatre of Shreveport Corp.*, supra, slip op. at 1 fn. 2.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to give unit employees evaluations and pay increases, if warranted, without first giving the International Union of Operating Engineers, Local 12, AFL–CIO, notice and an opportunity to bargain about the matter. The unit is:

> All full-time and regular part-time customers service associates/yardmen, dispatchers, mechanics, parts associates, safety analyst, sales coordinators, drivers and shop foremen employed at or out of the Employer's facility located at 3455 San Gabriel River Parkway, Pico Rivera, California; excluding parts manager, outside sales representatives, guards and supervisors as defined in the Act.

WE WILL NOT fail to give employees evaluations and pay increases, if warranted, because the employees supported the Union.

WE WILL NOT implement a dress code that prohibits employees from displaying a union logo.

WE WILL NOT implement a dress code because the unit employees supported the Union.

WE WILL NOT restrict the use of company vehicles because the employees supported the Union.

WE WILL NOT rescind the practice of allowing employees to take days off without pay without first giving the Union notice and an opportunity to bargain about the matter.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL resume the practice of performing yearly employee evaluations and granting wage increases, if warranted.

WE WILL perform the evaluations and retroactively grant pay increases, if warranted, for 2005, plus interest.

WE WILL rescind the April 20, 2005 dress code.

WE WILL rescind the April 20, 2005 notice restricting the use of company vehicles, restore the practice that existed prior to its issuance, and make the employees whole for any losses they suffered as a result of the unlawful conduct, with interest.

WE WILL revoke the rescission of the practice of allowing employees to take days off without pay and restore the practice that existed before the unlawful rescission.

UNITED RENTALS, INC.

Ami Silverman and *Irma Hernandez, Esqs.,* for the General Counsel.

James E. McGrath, III and *Daniel F. Murphy, Jr., Esqs. (Putney, Twombly, Hall & Hirson, LLP),* of New York, New York, for Respondent.

David Koppelman, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on November 1 and 2, 2005. The charges in Case 21–CA–36814 and Case 21–CA–36930 was filed April 21 and June 28, 2005,[1] respectively, and the order consolidating cases, consolidated amended complaint and notice of hearing (the complaint) was issued September 16. Both charges were filed by the International Union of Operating Engineers, Local 12, AFL–CIO (the Union). The complaint alleges that United Rentals, Inc. (Respondent) violated Sections 8(a)(5) and (3) by ceasing its practice of issuing job performance appraisals and merit increases to employees and promulgating a rule eliminating personal unpaid days off, violated Sections 8(a)(3) and (1) by promulgating a rule that restricted the right of employees to wear union logos and other protected messages on their clothing, and violated Section 8(a)(3) by promulgating a rule that forbid employees from taking their service trucks home. Respondent filed a timely answer that denied it violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel[2] I make the following.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, rents and sells construction equipment and supplies at its facility in Pico Rivera, California, where it annually sells and ships goods and services valued in excess of $50,000 directly to points outside California. Respondent admits and I find that it is an employer engaged in

[1] All dates are in 2005 unless otherwise indicated.

[2] The General Counsel's unopposed motion to replace "reasons" with "raises" on line 1, p. 55 of the transcript is granted.

commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates over 700 facilities throughout the United States, including one in Pico Rivera, California. It has about 80 collective-bargaining agreements with various labor organizations. After winning an election on July 23, 2004, the Union was certified by the Board on March 4, 2005, as the bargaining representative for the following unit of employees:

> All full-time and regular part-time customer service associates/yardmen, dispatchers, mechanics, parts associates, safety analyst, sales coordinators, drivers and shop foremen employed at or out of the Employer's facility located at 3455 San Gabriel River Parkway, Pico Rivera, California; excluding parts manager, outside sales representatives, guards and supervisors as defined in the Act.

The parties thereafter engaged in collective bargaining but as of the hearing in this case no contract has been reached. Peter Meany is Respondent's director of labor relations; he has been Respondent's chief negotiator in bargaining with the Union.

Effective January 2005, Randy Hall was Respondent's district manager; he oversaw the operation of nine "aerial facilities" located in California, Nevada, and Arizona, including the Pico Rivera facility. Aerial facilities handle aerial equipment such as scissors, booms and forklifts for construction and industrial customers. Other facilities may have similar equipment, but they primarily carry homeowner type equipment. The other eight facilities overseen by Hall are nonunion. Effective January 1 Hall became the acting branch manager for the Pico Rivera facility; this was in addition to being the district manager. Donnie Richardson was Respondent's safety manager and then he became operations manager at the facility in February. Marius Dornean was the service manager at the facility. All these persons are admitted agents of Respondent.

In *United Rentals,* JD(SF)–36–05 Judge William L. Schmidt concluded that Respondent violated Section 8(a)(3) and (1) by discharging an employee on March 30, 2004, because the employee had supported the Union and violated Section 8(a)(1) by coercively interrogating an employee concerning union activity and impliedly promising to consider an employee's pay increase if the employees rejected unionization. Exceptions were filed and the matter is pending before the Board.

B. Performance Appraisals and Merit Increases

Respondent's handbook describes its compensation program as very competitive and designed to attract, retain, and develop talented people in support of its mission. It describes Respondent's "pay for performance" program as designed to reward employees for individual contributions to Respondent's overall success. The goals of the compensation program are described as:

> Recognize and reward employees based on their individual abilities and performance.
>
> Obtain the highest possible degree of employee performance, morale, and loyalty through fair and equitable compensation.
>
> Ensure internal compensation equity and consistency between all departments and divisions of the company.
>
> Provide uniform methods of establishing compensation for hiring, performance-based merit increases, promotions and other pay adjustments.

Respondent sets salary bands for the various job classifications based on salary surveys that it purchases. Those salary bands may be further adjusted for geographic differences for the costs of labor.

Respondent has a policy of providing employees with performance evaluations and pay increases. Respondent's employee handbook describes its performance evaluation process as an opportunity for the employee and supervisor to formally discuss the employee's job performance, review how well the employee did in attaining goals the previous year, set goals for the next evaluation period, and discuss the employee's career development. The handbook continues:

> Your performance evaluation is an important tool used by management to correct any performance shortfalls, and to award merit increases, salary adjustments, and promotions.

Respondent uses an evaluation form that lists several job responsibilities and key behaviors and employees are rated in those responsibilities and behaviors on a four-part scale from very good to unacceptable. Respondent has guidelines concerning the percentage of employees who should receive each rating, although the guidelines are not rigidly enforced. Respondent sets a pay increase band for each of the final ratings received by employees. However, if employees are already at the top of their salary band they may not receive a salary increase even though they have received favorable evaluations.

Salary increases are effective April 1 and evaluations are completed and discussed with employees before that time. Each year Respondent sets a percentage of base pay for pay increases. This percentage is based on factors such as surveys of what other companies are paying, the economy in general, and Respondent's financial situation. In determining the pay increases that follow the appraisal process Respondent's managers and supervisors use the MeritNet System, described as a web-based total compensation planning tool. It provides Respondent's managers and supervisors with the ability to make pay increase recommendations while monitoring how those recommendations are tracking against the total pool of money allocated for pay increases. It uses a merit matrix that takes into account an employee's performance rating and the position the employee's salary falls within the salary band set for the employee's job grade. The merit matrix then recommends a merit increase amount if warranted by the employee's evaluation rating and position in the employee's salary band. The branch manager of each facility may adjust the recommended wage increases so long as the total amount remains within the pool of money allocated for the facility. District managers may reallocate money for wage increases from one branch to another so long as the total increases remain within the pool of money set for the district. In applying the merit matrix Respondent strongly encourages its managers to follow guidelines concern-

ing the percentage of employees who should receive each of the four ratings used in the evaluation.

Since at least 2001 employees at the Pico Rivera facility received written performance evaluations and wage increases if warranted. However, in 2005 the unit employees at the facility did not receive either an evaluation or a wage increase. Nonunit employees at the Pico Rivera location and employees at other facilities continued to receive evaluations and salary increases as they had in the past.

The parties met for the first bargaining session on May 5. Kurt Glass is the Union's recording corresponding secretary and was the Union's chief negotiator. During the course of the meeting on May 5 Glass asked about Respondent's policy for wage increases. Peter Meany, Respondent's chief negotiator and director of labor relations since April 2002, replied that they gave discretionary pay for performance pay increases in the past. Glass asked whether increases were given in 2005 for the unit employees and Meany replied that the 2005 increases had not been given but were subject to the negotiation process.[3]

On May 6 the Union sent Respondent a letter claiming that at the May 5 bargaining session Respondent had stated that it had ceased its historical practice concerning employee evaluations and wage increases due to the Union's "election activity." The Union requested that the practices be restored pending the outcome of negotiations. On May 17 Respondent answered. It asserted that the Union inaccurately recounted what Respondent had said concerning employee evaluations and wage increases at the May 5 meeting. Respondent claimed that it had given discretionary wage increases to employees in the past.

Meany testified that he made the decision not to continue the merit pay increases for 2005 for the unit employees at the Pico Rivera facility. He explained that one reason he made this decision was that he was fearful that unfair labor practice charges of soliciting grievances could be filed stemming from discussions with employees of their performance evaluations. Meany also testified that:

> I knew that the issue of certification was pending and that once the Union was certified, I had an obligation to bargain with the Union over wages, and I was concerned that I would get a charge about that as well. I also had to bargain with the Union and I fully intended to do that, if and when they were certified.

Analysis

As indicated, the complaint alleges that Respondent violated Section 8(a)(3) and (5) by failing to give the unit employees their evaluations and merit increases in 2005. Turning first to the 8(a)(5) allegation, an employer violates the Act when it unilaterally changes working conditions of employees represented by a labor organization. *NLRB v. Katz,* 369 U.S. 736 (1962). It is also well settled that this applies to unilateral changes in working conditions made while objections to an election are awaiting resolution and the union is ultimately certified, absent circumstances not raised in this case. *Mike O'Connor Chevrolet,* 209 NLRB 701, 703 (1974). Here, the evidence shows a practice of yearly evaluations followed by wage increases if warranted. The regularity of this process is borne out by the fact that it is described in detail in Respondent's employee handbook and has been followed for several years. Indeed, employees at other facilities received the evaluations and wage increases that Respondent denied to the unit employees at the Pico Rivera facility. I conclude that the evaluations and accompanying wage increases became a condition of employment. As noted by the General Counsel, the Board has held that the unilateral cessation of pay increases violates the Act even if the amount of increase is discretionary. *Daily News of Los Angeles,* 315 NLRB 1236 (1994), enfd. 73 F.3d 406, 412 (D.C. Cir.1996), cert. denied 510 U.S. 1090 (1997); *Lee's Summit Hospital* 338 NLRB 841 (2003).

Respondent argues that the Act prohibited it from continuing to grant the employees the wage increases. It describes the MeritNet system as:

> a comprehensive, interactive, discretionary wage system, the outcome of which depends on numerous factors, including but not limited to, an employee's performance. Imposition of the company's performance evaluation system in the midst of ongoing negotiations is contrary to the Act and would disrupt, rather than further, negotiations toward a labor agreement.

Respondent argues that *Daily News* is not applicable because its MeritNet process for determining wage increases is more discretionary than that of the employer in *Daily News*. It argues that the raises given to other employees effective April 1 but not given to the unit employees at that time were discretionary as to *time* as well as amount. I reject that contention. The process described above has definite time lines ending with pay increase, if warranted, effective on about April 1 of each year. That Respondent occasionally gave pay increases in addition to those effective April 1 does not detract from the regularity of the April 1 time line. Respondent argues:

> If (its evaluation and wage process became) entrenched in the parties' bargaining relationship, United Rentals would retain the unassailable prerogative to periodically award, alter or withhold wage increases without the input of the Union. The Company would further be entitled to solicit grievances and deal directly with employees over not merely wages, but all terms and conditions of employment at the Pico Rivera Branch. . . . Put simply, neither the Supreme Court in *Katz* nor the Board in *Daily News* intended to endorse, and indeed mandate, such a lopsided bargaining relationship.

No such results, however, would flow from a requirement that Respondent continue to adhere to its evaluation and wage process; the Union (and Respondent for that matter) would be free to bargain in the future about changing the process. Respondent points out that it was willing to bargain with the Union to resume using its evaluation and wage process; the Union, however, is not obligated to try and regain in negotiation something that was unlawfully taken.

In the alternative, Respondent argues that if *Daily News* cannot be meaningfully distinguished from the facts of this case, then *Daily News* was incorrectly decided and is inconsistent

[3] The facts concerning this meeting are based on a composite of the testimony of Meany and Glass.

with Katz. However, that argument was made and rejected by both the Board and the Court in *Daily News.* Respondent cites *Acme Die Casting,* 93 F.3d 854 (D.C. Cir. 1996); however, I am bound to follow Board law. Respondent cites *Ithaca Journal-News,* 259 NLRB 394 (1981). However, in that case, unlike here, the Board concluded that the employer did not conduct any formal or written evaluations of the employees and that a significant number of wage increases were randomly granted. That case is therefore distinguishable. Respondent also argues that the Union was familiar with Respondent's evaluation and wage process but it failed to timely demand bargaining. This argument fails; the Union was under no obligation to request bargaining because Respondent had failed to continue its practice for 2005 for the unit employees by the time the parties began bargaining. In a similar vein, Respondent cites *TXU Electric Co.,* 343 NLRB 1404 (2004). However, that case too is not dispositive because there the employer gave the union notice of its intent to change the existing practice before it made the change. Here, Respondent informed the Union of the change after the fact. Finally, Respondent argues that economic exigencies allowed it withhold the pay increases for the unit employees. This is a very weak argument for several reasons. Although there is evidence in the record that Hall concluded that the Pico Rivera facility was underperforming financially, the evidence is that Meany made the decision to withhold the raises and Meany did not testify that economic circumstances entered into his decision. Nor does Respondent explain why the nonunit employees at Pico Rivera received their evaluations and pay increases if the entire facility was underperforming. Moreover, there is no evidence that Respondent withholds pay increases from underperforming branches; rather, the evidence is that Respondent's evaluation and pay process applies to all facilities.

In sum, I reject the arguments made by Respondent that it was privileged to deny unit employees at the facility their customary evaluations and wage increases. I conclude that by doing so Respondent violated Section 8(a)(5) and (1) of the Act.

I turn now to argument that Respondent violated Section 8(a)(3) and (1) by failing to grant the employees their evaluations and wage increases in 2005. I apply *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). One of the elements of finding a violation under Wright Line is that the employer had knowledge of the union activities of its employees. That element is easily established in this case; the Union won an election among the employees at the Pico Rivera location on July 23, 2004. In this regard I note that this case does not involve allegations that Respondent singled out a specific employee for retribution for engaging in union activities. Rather, the allegation here is that the entire unit was punished. In other words, the scope of Respondent's knowledge matches the allegations and therefore is sufficient to satisfy this element of the General Counsel's case.

Another element for showing a violation under *Wright Line* is to establish that an employer was hostile to the union activities of the employees. In this case the General Counsel points me to two statements made by witnesses at the trial that he claims will show Respondent exhibited the requisite animus. I turn to examine that testimony. As more fully described below, on about April 20 Respondent announced a change concerning when employees could take Respondent's vehicles home with them at the end of the workday. A meeting was held at which this and other changes were discussed with the employees. After the meeting the field service mechanics talked to Donnie Richardson, Respondent's operations manager, and Marius Dornean, Respondent's service manager. Martin Urrea has worked for Respondent and its predecessor as a field service mechanic since 1989. According to Urrea, one employee said that the employees deserved to be paid more money if they were to be "on call"[4] if they were now unable to take the company trucks home. According to Urrea, the employees also mentioned that they deserved a raise because it had been over a year since they received a raise. Again according to Urrea, Richardson replied that they couldn't get a pay increase because of the Union, that if the employees had not brought in the Union he would already have given them a raise. Urrea also testified that in September or October 2004, he asked Richardson why they did not get a raise that year; Richardson answered that because of the union issue they could not give a raise. Richardson, on the other hand, denied that he or Dornean discussed the Union with the employees and that he did not believe that any of the employees discussed or mentioned the Union either. I do not credit Urrea's testimony described above. I recognize that Urrea is a long-term, current employee of Respondent. I also take into account the fact that Respondent did not call Dornean to corroborate Richardson's denial. This could allow me to draw an adverse inference, but I decline to do so under the circumstances of this case. I note that there is no evidence to corroborate Urrea's testimony despite the fact that several employees were present and presumably heard Richardson's alleged statement. Importantly, Urrea provided the General Counsel with a pretrial affidavit but the affidavit made no reference to the statement that Richardson allegedly made after the April 20 meeting. I also take into the fact Urrea testified with the assistance of a Spanish interpreter while the April 20 events occurred in English. This increases the possibility of misunderstanding. Perhaps most telling was Urrea's testimony that Richardson made a similar statement in September or October 2004. Although Richardson did not deny making that statement, it is so inherently implausible that Richardson did so that it undermines Urrea's credibility on this issue. This is so because Urrea and other employees did receive a wage increase in 2004 so there would be no reason for the discussion to arise in the first place. I have also considered the relative demeanor of Urrea and Richardson while testifying, but I am unable to conclude Urrea's demeanor was superior to Richardson's. Under these circumstances I do not credit Urrea's testimony on this matter.

The General Counsel also relies on the testimony of employee Steven Lee Grove that an employee known by Grove only as "Lee" told him that Nancy Contreras, Respondent's office manager, told him that the evaluations were already

[4] This refers to when an employee must be available 24 hours a day to accept a call and repair machinery.

typed up but the lawyers from New York wouldn't allow her to give any evaluations because of the union activity. This testimony is classic hearsay. Although at the hearing I overruled an objection to that effect, I did so for the stated reason that the objection came too late. The fact, nonetheless, is that the testimony remains hearsay and Grove was unable to even identify the last name of the employee. Upon consideration, I conclude that this testimony is not of a nature that should be accepted for the truth of the matter asserted.

The General Counsel relies on the findings in United Rentals, JD(SF)–36–05. In that case Judge William Schmidt concluded that Respondent violated Section 8(a)(3) and (1) by discharging an employee on March 30, 2004, because the employee had supported the Union and violated Section 8(a)(1) by coercively interrogating an employee concerning union activity and impliedly promising to consider an employee's pay increase if the employees rejected the unionization. These, indeed, are serious unfair labor practices findings. But I note that those unfair labor practices occurred about a year before the allegations in this case and thus are somewhat remote in time. I also note that those unfair labor practices are not directly connected to the allegation at issue here. On balance, I conclude the findings in United Rentals are alone insufficient to establish that antiunion animus motivated Respondent's conduct in this case.

More significant to the issue of animus are the findings I make in this case. I have already concluded above that Respondent violated Section 8(a)(5) and (1) refusing to conduct evaluations and grant pay increases for unit employees effective April 1. I conclude below that Respondent violated that same section by rescinding its practice of allowing employees to take days off without pay. I further conclude below that Respondent violated Section 8(a)(1) by implementing a dress code that prohibits employees from displaying a union logo. These findings demonstrate a willingness by Respondent to violate the Act in its effort to undermine the Union.

Also, as the General Counsel points out, unlawful motivation may be inferred from the totality of the circumstances. Here the evidence shows that, except for employees covered by a collective-bargaining agreement, only the Pico Rivera unit employees did not receive their evaluations and wage increases in 2005 while employees at other facilities received them. The difference between the two groups of employees is that the Pico Rivera unit employees had voted to select the Union whereas the other employees had not. This disparate treatment supports an inference of antiunion animus and unlawful motivation. Finally, as more fully described below, in the month following the Union's certification by the Board Respondent issued three notices to the employees at the Pico Rivera facility each of which rescinded practices that had been beneficial to those employees. I conclude that the General Counsel has met his initial burden under *Wright Line.*

Respondent argues that it was motivated to withhold the evaluations and pay increases in 2005 for the unit employees out of a fear that charges might be filed concerning statements it would make to employees in the course of conducting their evaluations. It points to Judge Schmidt's decision. However, this cannot serve as a lawful basis for Respondent's actions. Respondent is able to comply with the law and at the same time discuss employee performance.

Respondent argues that it was also motivated by a belief that continuing to conduct evaluations and grant pay increases would have violated its obligation to bargain with the Union. I have concluded above that as a matter of law this was incorrect. And based on the reasons described in preceding paragraphs I conclude that antiunion animus, and not a good faith belief as to its obligations under the Act, motivated Respondent's conduct.

I would normally now examine whether Respondent has shown that it would have failed to give these employees evaluations and wage increases even if they had not selected the Union and the Union had not been certified. Respondent makes no such arguments in this case, at least that not have been previously discussed and rejected.

I conclude that Respondent violated Section 8(a)(3) and (1) by failing to give the unit employees evaluations and wage increases in 2005.

C. Dress Code

Effective January 1, 2004, Respondent's corporate-wide policies and procedures bulletin set forth a written dress code. That bulletin applied "to all sales coordinators, senior sales coordinators, sales representatives, branch managers and assistant branch managers at all branch locations." It listed appropriate attire for those employees for the workplace such as "collared shirts in polo or oxford style." The bulletin also states:

> The following attire is considered inappropriate for the workplace:
>
> Any hat worn indoors, including branded caps.
> T-shirts, sweatshirts, flannel shirts, sleeveless tops, strapless tops and all other non-collared shirts.
> Jeans of any kind or color.
> Sweatpants, jogging suits, spandex apparel, shorts, leggings and stirrup pants.
> Cowboy boots, sandals, canvas shoes, athletic shoes of any kind and hiking boots, even if they are safety-qualified.
> Any attire that is frayed, faded, torn, revealing, or extremely baggy.

In practice Respondent employees, at least in Hall's district, generally wear distinctive clothing while at work. The clothing varies according to the classifications of employees. Certain employees, such as sales representatives and management personnel, wear khaki pants and collared shirts, "preferably United Rentals shirt[s]" according to Hall's testimony. Other employees such as mechanics and drivers wear blue pants with a blue shirt that Respondent provides for them. The shirts have the name of the employee and Respondent's name on them. These employees are not required to wear the clothing provided by Respondent in that they may wear the clothing worn by the sales representatives without violating any dress code policy. But because Respondent does not provide these employees with the other clothing they generally wear the blue pants and blue shirt.

In addition to the attire described above employees at the Pico Rivera facility wore other clothing while at work. Grove,

who works as a shop mechanic, wore a hat bearing the name "Grove Equipment Service." He also wore hats bearing the name of one of Respondent's vendors. Grove also wore a t-shirt at work with the Union's logo on it, although on occasion he was told by his supervisor to wear his uniform shirt over the union shirt. Grove and other employees wore a union pin on their shirts; that pin had two flags and the Union's logo on it. Urrea, who worked as a field service mechanic for Respondent at the Pico Rivera facility, explained that while the employees at the Pico Rivera facility wore the blue pants and blue shirt described above they also used to wear jackets and hats with logos on them, including hats with the Union's logo on them. Gregorio Pino worked as a mechanic at the Pico Rivera location from 2000 to around August 2005, at which time he resigned. Pino wore hats at work that suppliers had given to him and that bore the suppliers' logo. He too wore the hat with the Union's logo on it and saw other employees also wear that hat.

On April 20 the employees at the Pico Rivera location attended a monthly safety meeting. At this meeting Richardson and Dornean distributed two notices to employees from Hall. One concerned the dress code and was addressed to "All Employees." It was on Respondent's letterhead with the Pico Rivera address information and read:

> Effective Monday, May 2nd , 2005, the following attire will no longer be allowed to be worn:
>
> Jeans of any kind or color.
> Any Logo's on Shirts, Hats, Sweatshirts or Jackets other than United Rentals.
> T-Shirts, Non Collared Shirts, Flannel Shirts and Sleeveless tops.
> Sweatpants, jogging suits and shorts.
> Cowboy Boots, Sandals, Canvas Shoes, Athletic Shoes of any kind and hiking boots even if they are safety-qualified.
>
> Any employee reporting to work improperly dressed will be sent home by his or her supervisor to change into proper clothing.

Dornean and Richardson reviewed this dress code notice with the employees at the meeting.

After this code was announced the employees at the Pico Rivera facility no longer wore the hats, shirt, jackets and pin described above. Respondent provided employees with a black cap with Respondent's name on it. Grove saw that some of Respondent's employees from other facilities continued to wear caps other than Respondent's cap when they came to and worked at the Pico Rivera facility. These employees were from facilities that were not under Hall's supervision. Similarly, Urrea saw an employee from another facility wearing a cap with a logo on it while they both were working in the field. There is no evidence, however, that Respondent's supervisors were aware that these employees were wearing that clothing.

The facts concerning the dress code practice at Pico Rivera, both before and after the April 20 notice, are based on the testimony of Grove, Urrea, and Pino. Their testimony was largely uncontradicted, mutually corroborative, and consistent. Their demeanor on this matter appeared straightforward and credible. I have considered the testimony of Manuel Salcido, an organizer for the Union. In his pretrial affidavit given on May 10 Salcido indicated that most of the employees at the Pico Rivera location continued to wear the union pin on their clothing even after the April 20 notice; he reaffirmed that assertion on cross-examination. The difficulty with this evidence is that there is no foundation to establish how Salcido, a union organizer, had direct knowledge of what the employees were at work. His testimony indicates he met employees after work. Salcido's testimony conflicts with that of the employees who actually work at the Pico Rivera facility; I conclude that their testimony is more credible.

Analysis

The General Counsel alleges two separate violations concerning the issuance of the dress code memorandum. First, he argues that dress code forbids "employees from displaying union logos or insignia or other protected messages, and thereby restricts employees from engaging in activity protected by the Act." Employees generally have the right under the Act to wear union insignia in the workplace. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945). As broadly written, the new dress code's proscription includes the wearing of shirts, hats, sweatshirts and jackets that bear a union's logo. To that extent the new dress code appears unlawful.

Under special circumstances an employer, however, may limit or prohibit employees from displaying union insignia. The special circumstances are limited to situations where an employer can show that the wearing of the insignia adversely affected its business or created safety or disciplinary problems. *Inland County Legal Services,* 317 NLRB 941 (1995). Respondent argument in its brief on this issue is difficult to follow. On the one hand it cites cases for the proposition that an employer may prohibit employees from wearing union insignia that would unreasonably interfere with a public image which the employer has established through appearance rules for its employees; Respondent argues that it highly values the professional appearance and image of its employees. Yet in the next sentence it asserts "Contrary to the assertions of the Counsel for the General Counsel, United Rentals does not forbid the wearing of Union insignia." As to the argument that Respondent may limit the display of union logos to advance its public image, the evidence is inadequate to sustain such a conclusion. The ban on logos applies to all employees at the Pico Rivera facility whether or not they are in contact with the public. And it applies to all logos, no matter how small or inconspicuous they might be. Even more importantly, the evidence shows that this ban is not corporate-wide thereby belying the argument that the ban is necessary to project a desired public image. As to the argument that it does not forbid the wearing of union logos, the plain language of the new dress code says otherwise. I note that there is no evidence that Respondent has communicated any clarification of the new dress code to the affected employees. By implementing a dress code that prohibits employees from displaying a union logo, Respondent violated Section 8(a)(1).

As indicated, the General Counsel also alleges that the April 20 dress code itself was issued in retaliation for the employees' union activities and therefore violated Section 8(a)(3) and (1). I again apply the *Wright Line* analysis. As explained in the pre-

ceding section of this decision Respondent was aware of the prounion sympathies of the unit employees and it has shown an animus towards those sympathies. The timing of the issuance of the dress code notice and its part as one of three such notices that withdrew benefits for the Pico Rivera employees also support the inference of unlawful motivation. So too does the fact that the dress code notice was directed at the Pico Rivera facility only. I conclude that the General Counsel has met his initial burden of showing that the April 20 version of the dress code was implemented because the unit employees selected the Union as their collective-bargaining representative.

I turn now to examine whether Respondent has shown that it would have issued the April 20 dress code notice even if the unit employees had not supported the Union. At the hearing Hall testified that he issued the memo to bring professionalism to the branch as employees had been wearing shorts to work, as well as safety concerns because he had employees walking around without safety boots. Hall claimed he was unaware of the fact that employees had been wearing the Union insignia on their clothing at work; he admitted that allowing logos to be worn on caps or clothing did not affect employee safety.

Respondent argues that Hall essentially restated existing policy, but as set forth above the April 20 dress code notice went beyond existing policy. When asked why he did not simply reissue the existing dress code, Hall answered:

> Umm . . .We just basically wrote it off the policy. We looked at the policy that was in the [sic] and the policy that has been put forth by my regional vice-president wants all of his stores operating under the same - you know of which my nine stores in my district operate under the same dress code.

This answer speaks for itself. The notion that Hall was simply following the orders of his vice-president is totally without corroboration and supporting details; I do not credit this testimony. Indeed, the entire tenor of Hall's testimony was one of someone searching for a lawful explanation rather than one of someone simply relaying the facts.

Hall testified that he did not issue memoranda for the other eight facilities in his district because he did not need to. But here too Hall's testimony is without supporting details or corroboration. Again I do not credit Hall's testimony. I find that Respondent has not shown that it would have issued the April 20 dress code notice even if the unit employees had not supported the Union. By issuing the April 20 dress code notice Respondent violated Section 8(a)(3) and (1).

D. Service Trucks

Respondent's policy and procedures bulletin contains a vehicle policy that prohibits the use of unassigned company vehicles for personal use. However, if the facility manager "determines that, for business purposes, a company vehicle is to be stored off premises and/or at an employee's home, then the Manager shall assign the vehicle to the designated employee."

As indicated above, Urrea has worked for Respondent as a field service mechanic since 1989. He repairs machinery on location and had used a truck provided by Respondent to travel to those sites from his home. He took the company truck home every day, regardless of whether he was on call. He was one of about eight field service mechanics employed in April 2005 each of whom was also provided a company truck that they took home every day. These employees would fill the trucks with gas at the Pico Rivera facility; they did not have to purchase the gas themselves. This had been the practice since Urrea started working in 1989. Although these employees may have had tax obligations flowing from the personal use of the vehicles, no payroll deductions were made to cover these obligations.

As mentioned above, at the April 20 safety meeting Richardson and Dornean gave the employees two notices. The second notice, also from Hall, concerned service trucks and read, in pertinent part:

> Effective Monday, May 16th, 2005, the service mechanics that are on call along with outside service vendor mechanics, will be the only service trucks that will be taken home. When you are not on call you will be required to come into the office, check in and pick up your service truck at the start time that you are assigned.

As previously described in part above, after the safety meeting about six field service mechanics met with Richardson. They complained that they wanted more money when they were on call. Richardson consulted with Hall and then advised the employees that they would receive pay for a set amount of hours when they were on call, even if they did not work during that period.

After the April 20 truck usage notice Urrea and the other field service mechanics had to drive their personal vehicles to the facility where they then took the company trucks to drive to the worksite. Three managers at the Pico Rivera location also had their vehicles taken away as a result of this change.

Analysis

The General Counsel alleges that Respondent implemented the truck usage notice in violation of Section 8(a)(3) and (1). I apply the Wright Line framework and conclude for reasons previously stated that the General Counsel has met his initial burden of showing the notice was issued because the unit employees had selected the Union to represent them. I note that the practice of allowing employees to use company vehicles to come to work and return home was longstanding and of obvious benefit to those employees. I further note that Respondent's corporate procedures do not prohibit this practice; this further heightens the inference drawn from the fact that the April 20 notice applied only to the Pico Rivera location and therefore was issued because the unit employees there had selected the Union. Respondent argues that because the truck usage notice was applied to three managers at the Pico Rivera location as well as the unit employees no unlawful motivation can be found. But the fact remains the April 20 notice on its face is addressed only the Pico Rivera employees, and the unit employees there had supported the Union.

Concerning whether Respondent would have issued the truck usage notice even in the absence union activity, at the hearing Hall testified that he implemented the change in truck usage to make it consistent with the policy of his district vice-president that vehicles are left at the branch except for those employees

on call. He testified that this was consistent with Respondent's policy manual. Again Hall's testimony lacks detail and corroboration and again I do not credit it.

Later, in response to a leading question, Hall added that in "the old Northwest Region" 45 percent of all accidents with company vehicles occurred after hours, however he admitted that he did not have data concerning the Pico Rivera facility accident record. I conclude Hall is again searching for reasons to justify his conduct. Hall did not testify that the tax consequences discussed above played a role in his decision to change the vehicle usage practice. Respondent has not shown that it would have issued the April 20, 2005, restricting the use of company vehicles even if the unit employees had not supported the Union. Respondent therefore violated Section 8(a)(3) and (1).

E. Unpaid Days Off

Respondent provides its employees with sick leave; its policies and procedures bulletin indicates that the purpose of sick leave is to provide continuing income to employees who miss work due to "illness, injury, or any other disability." Employees are paid for accrued but unused sick leave each year.

On April 25 Hall posted a notice concerning vacation and sick time. It provided, in pertinent part:

> Clarification is required on some of the policies and procedures at the Pico Rivera branch, to ensure everyone is operating under the correct and proper practices throughout the branch. Fairness throughout the branch is the intent of all practices at this branch. We are a team and everyone on the team is to be treated equally and fairly. We have a large number of employees and to accommodate various requests from all employees, planning and advance scheduling is required to keep the branch continuously operating at 100%.
>
> . . .
>
> All unscheduled days off will be used as sick time. If all sick days are taken, you are allowed to use vacation time, as long as an employee has vacation time accrued. There will no longer be time away from work at no pay, such as "Personal Unpaid Days." The branch can not operate at 100% with the last minute requests for "Unpaid days off." The company provides all employees with ample vacation and sick time. Please use your paid time off wisely.

Prior to this announcement employees at the Pico Rivera facility had been permitted for years to take days off without pay instead of using their sick or vacation time.

On May 29, 2003, Hall had issued the following memorandum for the employees at the Modesto facility, one of the nine facilities in his district:

> Effective immediately, personal time will no longer be allowed for time off. If you have vacation or sick time available that will have to be used for any time missed. If you only miss up to 2 hours on any given day it will be an option then if you want to use any available vacation or sick time.

The employees at Modesto are not represented by a labor organization.

Analysis

The General Counsel alleges that Respondent violated both Section 8(a)(5) and (3) by issuing and enforcing the memorandum described above. I again turn first to Section 8(a)(5) allegation. The facts show, and I conclude, that employees were permitted to take unpaid time off instead of using accumulated sick or vacation time. This became, for them, a working condition. Respondent altered that practice without first notifying the Union to allow it an opportunity to bargain. As more fully described in a previous section of this decision, an employer may not unilaterally change working conditions for employees represented by a union.

Respondent makes several arguments to justify its conduct. First, Respondent cites *Bath Iron Works Corp.,* 302 NLRB 898 (1991) and *Watsonsonville Register-Pajaronian,* 327 NLRB 957 (1999) for the proposition that only material, significant, and substantial changes in working conditions trigger an obligation to bargain first with a union. That certainly is settled law, but it does not absolve Respondent in this case because the change it made was substantial. Prior to the change, employees were allowed to take days off from work, albeit without pay, beyond sick and vacation days. The freedom to take these extra days off from work cannot be labeled as insignificant. Next, Respondent argues that it was merely correcting a laxity in the enforcement of its policy that had developed at the Pico Rivera facility. But the facts do not support that contention. The "days off without pay" practice was longstanding and consciously granted to the employees at the Pico Rivera facility. This is not a case and temporary laxity or mistaken application. Respondent argues that it merely restated existing policy, but this argument too is plainly incorrect. Existing policy requires that sick leave be used when employees are sick; the implemented policy requires employees to use sick leave whether or not they are sick. It appears, therefore, the implemented policy violates existing policy in this regard. Finally, Respondent again raises a waiver argument. But there is no obligation for the Union to request bargaining over a decision that has already been made by Respondent without prior notice to the Union.

While one can appreciate the burdens the "days off without pay" practice had on Respondent's ability to efficiently run its business, it was a burden of its own making and one that required bargaining with the Union first in any effort to alleviate it. I conclude that by rescinding its practice of allowing employees to take days off without pay Respondent violated Section 8(a)(5) and (1) of the Act.

I turn now to the allegation that Respondent violated Section 8(a)(3) and (1) by this same conduct. I need not repeat here the evidence I rely on to conclude that the General Counsel has met his burden under Wright Line. At the hearing and in response to a leading question Hall testified that policy set forth in the memorandum was consistent with the policy he followed in the eight other branches in his district. Hall testified that he was trying to take control of scheduling because employees had been calling in and stating that they were taking unpaid days off. Again in response to a leading question Hall testified that the facility's poor financial performance played a part in his decision to issue this memorandum. He explained that employees could take an unpaid day off and still collect on unused sick

time at the end of the year "which would be a financial–contribute to higher wages being paid out in those months that they were—that the bonus—it wasn't a bonus it was a pay out—for unused sick leave in January—." But he conceded that because employees were not paid for using unpaid leave, if they received pay for sick leave later the matter was financially a draw. Hall explained that when employees used unpaid leave by calling in at the last moment Respondent could incur overtime costs to cover for the employee's shift, but he soon conceded that the situation would be the same if the employee called in sick and used sick leave at the last moment. I again conclude that Hall's testimony is not credible. The answers, given in response to leading questions, were quickly revealed to be unsupportable. I have already concluded above that Hall's other testimony has not been credible.

Respondent argues that the May 29, 2003, notice that Hall issued to the employees at the Modesto facility shows that Hall has uniformly applied the same standard to both union and nonunion facilities. But that notice is not identical in scope to the April 25 notice, and the issuance of one notice at one facility does not establish a uniform practice. Respondent argues:

> Any laxity in the enforcement (of the sick and vacation leave) policies at the Pico Rivera Branch was the exception, rather than the rule, and arose solely to the disorder occasioned by the lack of a standing Branch Manager.

Respondent makes no reference to the record to support the assertion. This is so because the record cannot support such a finding. The record shows that the practice of allowing employees to take time off without pay has existed for years and long predated the departure of a permanent branch manager in 2004.

Respondent has not met its burden under Wright Line. By rescinding its practice of allowing employees to take days off without pay because the employees supported the Union, Respondent violated Section 8(a)(3) and (1).

CONCLUSIONS OF LAW

1. By failing to give the unit employees evaluations and wage increases in 2005 Respondent violated Sections 8(a)(5), (3) and (1).

2. By implementing a dress code that prohibits employees from displaying a union logo, Respondent violated Section 8(a)(1).

3. By issuing the April 20, 2005, dress code notice because the unit employees supported the Union Respondent violated Section 8(a)(3) and (1).

4. By issuing the April 20, 2005, notice restricting the use of company vehicles Respondent violated Section 8(a)(3) and (1).

5. By rescinding its practice of allowing employees to take days off without pay Respondent violated Section 8(a)(5), (3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent has unlawfully failed to give unit employees evaluations and wage increases in 2005, I shall order Respondent to resume its practice, perform the evaluations and retroactively grant pay increases, if warranted, plus interest as set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). Having found that Respondent unlawfully implemented the April 20, 2005, dress code, I shall order Respondent to rescind that dress code. Having found that Respondent unlawfully implemented the April 20, 2005, notice restricting the use of company vehicles, I shall order Respondent to rescind that notice, restore the practice that existed prior to its issuance, and make the employees whole for the losses they suffered as a result of the unlawful conduct, with interest as set forth in New Horizons, supra. Having found that Respondent unlawfully rescinded its practice of allowing employees to take days off without pay, I shall order Respondent to revoke the rescission and restore the practice that existing before the unlawful conduct.

The General Counsel seeks an additional remedy in this case. It argues that Respondent's pattern of violating the Act warrants a remedy requiring Respondent to read aloud the notice to the assembled employees at the Pico Rivera location. In support of its argument the General Counsel cites *WestPac Electric,* 321 NLRB 1322 (1996), *Maramount Corp.,* 317 NLRB 1035, 1037 (1995), and *Norman King Electric,* 334 NLRB 154, 164 (2001). The problem is that none of these cases involve the remedy of notice reading, much less need of such a remedy in this case. Because the General Counsel has failed to explain why the usual remedies are inadequate I deny his request for the additional remedy. I note the General Counsel does not seek a broad cease and desist order in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, United Rentals, Inc., Pico Rivera, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to give employees evaluations and pay increases, if warranted, without first giving the International Union of Operating Engineers, Local 12, notice and an opportunity to bargain about the matter.

(b) Failing to give employees evaluations and pay increases, if warranted, because the employees supported the Union.

(c) Implementing a dress code that prohibits employees from displaying a union logo.

(d) Implementing a dress code because the employees supported a union.

(e) Restricting the use of company vehicles because the employees supported a union.

(f) Rescinding the practice of allowing employees to take days off without pay without first giving the International Union of Operating Engineers, Local 12, notice and an opportunity to bargain about the matter.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Rescinding the practice of allowing employees to take days off without pay because the employees had supported the Union.

(h) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Resume the practice of performing yearly employee evaluations and granting wage increases, if warranted.

(b) Perform the evaluations and retroactively grant pay increases, if warranted, for 2005 plus interest.

(c) Rescind the April 20, 2005, dress code.

(d) Rescind that April 20, 2005, notice restricting the use of company vehicles, restore the practice that existed prior to its issuance, and make the employees whole for the losses they suffered as a result of the unlawful conduct, with interest.

(e) Revoke the rescission of the practice of allowing employees to take days off without pay and restore the practice that existed before the unlawful conduct.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Pico Rivera, California, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2005.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 13, 2006

APPENDIX

NOTICE TO EMPLOYEES

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to give unit employees evaluations and pay increases, if warranted, without first giving the International Union of Operating Engineers, Local 12, notice and an opportunity to bargain about the matter. The unit is:

> All full-time and regular part-time customer service associates/yardmen, dispatchers, mechanics, parts associates, safety analyst, sales coordinators, drivers and shop foremen employed at or out of the Employer's facility located at 3455 San Gabriel River Parkway, Pico Rivera, California; excluding parts manager, outside sales representatives, guards and supervisors as defined in the Act.

WE WILL NOT fail to give employees evaluations and pay increases, if warranted, because the employees supported the Union.

WE WILL NOT implement a dress code that prohibits employees from displaying a union logo.

WE WILL NOT issue a dress code because the unit employees supported the Union.

WE WILL NOT restrict the use of company vehicles because the employees supported the Union.

WE WILL NOT rescind the practice of allowing employees to take days off without pay first giving the International Union of Operating Engineers, Local 12, notice and an opportunity to bargain about the matter.

WE WILL NOT rescind the practice of allowing employees to take days off without pay because the employees had supported the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL resume the practice of performing yearly employee evaluations and granting wage increases, if warranted.

WE WILL perform the evaluations and retroactively grant pay increases, if warranted, for 2005 plus interest.

WE WILL rescind the April 20, 2005, dress code.

WE WILL rescind that April 20, 2005, notice restricting the use of company vehicles, restore the practice that existed prior to its issuance, and make the employees whole for the losses they suffered as a result of the unlawful conduct, with interest.

WE WILL revoke the rescission of the practice of allowing employees to take days off without pay and restore the practice that existed before the unlawful conduct.

UNITED RENTALS, INC.